IN THE SUPREME COURT OF THE UNITED STATES

NO. 90-149

OCTOBER TERM, 1990

THE PEOPLE OF THE STATE OF MICHIGAN

PETITIONER

v

NOLAN K. LUCAS

RESPONDENT

ON WRIT OF CERTIORARI
TO THE MICHIGAN COURT OF APPEALS

BRIEF FOR PETITIONER

JOHN D. O'HAIR
Prosecuting Attorney
County of Wayne

TIMOTHY A. BAUGHMAN*
Chief of Research,
Training and Appeals

DON W. ATKINS*
Principal Attorney, Appeals
12th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: (313) 224-5794

*Counsel of Record

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STATEMENT OF THE QUESTION

ARE EITHER THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT OR THE RIGHT TO PRESENT A DEFENSE VIOLATED BY THE EXCLUSION OF **ARGUABLY** RELEVANT EVIDENCE TO BE USED ON CROSS-EXAMINATION OR IN CONTRADICTION OF A SEXUAL ASSAULT VICTIM FOR FAILURE TO FILE A REQUIRED NOTICE OF INTENT TO EMPLOY SUCH EVIDENCE (THEREBY OBTAINING A PRETRIAL HEARING ON ITS ADMISSIBILITY/LEGAL RELEVANCE)?

OPINIONS AND ORDERS BELOW

The April 23, 1987 opinion of the Michigan Court of Appeals is reported at 160 Mich.App. 692; 408 N.W.2d 431 (1987) and is appended as Appendix A in the Petition for Certiorari (pp. 1a-7a). The September 27, 1989 order of the Michigan Supreme Court is reported at 433 Mich. 878; 446 N.W.2d 291 (1989) and is appended as Appendix B in the Petition for Certiorari (pp. 8a-9a). The March 7, 1990 opinion of the Michigan Court of Appeals (on remand) is unreported and is appended as Appendix C in the Petition for Certiorari (pp. 10a-12a). The June 5, 1990 order of the Michigan Supreme Court denying leave to appeal is reported at 434 Mich. 925; ___ N.W.2d ___ (1990) and is appended as Appendix D in the Petition for Certiorari (p. 13a).

STATEMENT OF JURISDICTION

The judgment of the Michigan Court of Appeals was entered on April 23, 1987.

The Michigan Supreme Court remanded the cause to the Michigan Court of Appeals by order dated September 27, 1989. The judgment of the Michigan Court of Appeals (On Remand) was entered on March 7, 1990. The Michigan Supreme Court entered judgment denying leave to appeal on June 5, 1990. The jurisdiction of this Court is invoked under 28 U.S.C., s. 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part, that in all criminal prosecutions the accused shall have the right "to be confronted with the witnesses against him."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that no person shall be deprived of liberty without "due process of law."

STATUTORY PROVISION INVOLVED

Mich.Comp.L.Ann. Sec. 750.520j;

Mich.Stat.Ann. Sec. 28.788(10) provides:

> (1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
>
> (a) Evidence of the victim's past sexual conduct with the actor.
>
> (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.
>
> (2) If the defendant proposes to offer evidence described in subsection (1)(a) or (b), the defendant within 10 days after the arraignment on the information shall file a written motion and offer proof. The court may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1). If new information is discovered during the course of the trial that may make the evidence described in subsection (1)(a) or (b) admissible, the judge may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1).

STATEMENT OF THE CASE

The Respondent, Nolan K. Lucas, was charged with two counts of criminal sexual conduct in the first-degree which were alleged to have occurred on August 31, 1984.

On September 14, 1984, Lucas secured the services of retained counsel (J. A. 2). On September 18, 1984, a preliminary examination was held in the Thirtieth District Court. The complainant, Wanda Brown, testified that for a period of approximately six to seven months before the date of the offense she and Lucas had been "dating". They had a boyfriend-girlfriend relationship [R. (Prel.Exam.) 4]. On cross-examination, Brown stated that she and Lucas had had sexual intercourse over one hundred times "(b)oth conventional, straight penal-vaginal sex, as well as oral sex, at different times" [R. (Prel. Exam.) 23]. She repeated the fact that a boyfriend-girlfriend rela-

tionship had existed and that they had talked of marriage [R. (Prel.Exam.) 24]. Brown denied that she was using the criminal justice system "to get revenge" [R. (Prel.Exam.) 35] or that she was jealous or that she had "fabricate(d) this story to punish him" [R. (Prel.Exam.) 41].

The Respondent testified that their relationship included repeated acts of sexual intercourse [R. (Prel.Exam.) 59]. As to the events of August 31, 1984, he stated that their was no coercion and that they had a voluntary consensual sexual encounter "the same way it had been just about every night before then, freely" [R. (Prel.Exam.) 62].

At the conclusion of the hearing, the Respondent was bound over for trial in circuit court on the charges contained in the complaint [R. (Prel.Exam.) 76].

On October 25, 1984, Mr. Lucas was arraigned on the information. (J. A. 2).

On November 14, 1984, a motion to adjourn the trial for the purpose of con-

ducting a polygraph examination, filed by the Respondent's retained attorney, was granted by the circuit court (J. A. 2).

On February 8, 1985, the trial date was again adjourned as the result of the entry of a substitution of counsel. On that date, newly-appointed counsel (Gayle Fort Williams) entered her appearance (J. A. 2).

On the opening day of trial, defense counsel made an oral motion to admit evidence of past sexual conduct between the Lucas and the complainant. Due to the Respondent's failure to comply with the notice requirement of MCL 750.520j(2); MSA 28.788(10)(2), the motion was denied (R. 3-6). Defense counsel did not request a continuance. Instead, the Respondent waived his right to be tried by a jury (R. 6-8). The matter was then heard by the Honorable Charles Farmer, Judge of the Wayne County Circuit Court, on May 14-15, 1985.

The complainant testified that she

had known the Respondent (who was known to her as "Chris") for six or seven months a "boyfriend-girlfriend" relationship had existed (R. 10-13). About two weeks before the date of the offense, the relationship was terminated (R. 11-12).

On the night of August 31, 1984 at about 10:15 p.m., Brown was walking to a corner gas station to buy cigarettes when the Respondent came out of his house and "abducted" her (R. 14). He grabbed her by the arm and held a knife in his hand (R. 15). While still armed with the knife, he took her into the dining room of his house and ordered her to remove all her clothing. Brown stated that this was against her will (R. 17, 20). She was then taken into the living room where Lucas poured two glasses of wine. She drank some of the wine in the glass he gave her (R. 19, 21). At one point, the Respondent opened a window slightly and that she heard the voice of a neighbor. Brown was going to call out but Lucas put

his hand on her neck, digging his fingernails into her flesh, and placed the knife to her neck (R. 22-23).

Throughout the time that Brown was with Lucas (about twenty-four hours), he repeatedly accused her of having had sex with a man named "Ricky" (R. 24-25, 28, 34, 111).

Brown testified that Lucas hit her with his closed fist four or five times in the right eye and then forced her to engage in an act of fellatio and an act of vaginal intercourse (R. 26-30, 32). Her right eye was blackened and she had a swollen face and bruised head as a result of being hit by him (R. 27). During the acts of penetration the knife was placed on the floor and was about twelve inches from their heads (R. 33).

About 1:00 a.m. on the following morning, Lucas struck her in the area of the right eye about seven more times. He then put his penis into her vagina. Ms. Brown testified that the knife was open

and lying on a coffee table at that time (R. 36-38).

Brown testified that she did not make any attempt to escape because she was afraid of him and because he had the key to the deadbolt lock on the front door in his pocket (R. 41-42). On cross-examination, she testified:

> "Q. Did you make an attempt to escape through the windows?
> "A. No, I thought about it, but I didn't do it.
> "Q. Why didn't you?
> "A. Because I was petrified. Chris [Respondent] stands about 6 feet tall. He had a knife in his hand. I am 5 feet even, about 100 pounds, and if I tried to escape but didn't escape, I thought he might try to kill me or hurt me seriously." (R. 79-80).

Her fear and the security locks on the house also kept her from trying to escape during the two or three times that Lucas went into the cellar for more wine (R. 80).

In the evening of September 1, at about 5:00 p.m., the Respondent called the complainant's mother and told her

that Brown had been injured slightly in a robbery attempt the night before. Brown testified that Lucas told her she could either consent to this story or he would "... make one phone call and somebody would have my mother ripped off and my kid snatched off the street." (R. 45)

Brown testified that after Lucas called her mother she slept for a while. When she woke up the Respondent walked her home. She stated that he had acted as though nothing had happened the prior night (R. 104). She testified that at that time her face was swollen, her head hurt, and her right eye was bruised (R. 47). When she got home, she did not tell her family what had happened because she was afraid, angry, and because her young son was there and she did not want him to see her or to know what had happened (R. 50).

On September 4, 1984, Brown filed a complaint with the police, She decided to go to the police because the day be-

fore the Respondent had repeatedly called her at work harassing and threatening her (R. 51). Prior to that time, her fear that Lucas would carry out his threats against her family had kept her silent (R. 51).

Brown testified that the police took a photograph of her face (R. 48-49). On cross-examination, she further explained the reason for the delay in reporting the incident:

> "Q. Why didn't you have a photo taken on the first, second or third?
> "A. Because I was petrified. I was scared to death. The only thing I wanted to do is put as much distance between him and myself.
> "Q. How did you become unafraid?
> "A. When I was sitting at work, at my typewriter, I kept thinking this man has threatened my life, my mother's and my son's. There is no man in my home. My child walks back and forth to school everyday. I met him under an alleged name, under family members that he claims were aunts and sisters, and all that was a lie. So I didn't know what route he would take, and I really didn't care what he would really do to me. At that point I said to myself I couldn't live like this. I couldn't work and be worried about my kid, calling the school every day having the principal go out of his way, meeting my boy halfway." (R. 112-113).

Brown stated that she believed his threats against her in part because he had used the knife to make superficial cuts on his own wrists. She testified that he told her he was not afraid to die while he did this (R. 114). Brown was examined by her family physician after talking to the police (R. 52).

On cross-examination, Brown stated that before her relationship with Lucas had ended they would see each other every day (R. 62). She liked him, cared for him, and was fond of him during the relationship (R. 66). She explained that he had harassed her throughout the two weeks between the time the relationship ended and the time of the assaults (R. 66-67, 69-70).

Brown denied that she had brought the charges against him as revenge for his having broken off their relationship.

She denied having thought that he was seeing other women during their relationship. She denied using the court to punish him (R. 109-110, 113).

Dr. Michael Sampson testified that he examined the complainant on September 4, 1984. He testified that her right eye was swollen and bruised and that there were abrasions on the right side of her neck (R. 91). The doctor was of the opinion that these injuries were from two to five days old (R. 94-95). The pelvic examination which he conducted revealed no evidence from which to conclude that a sexual assault had or had not occurred (R. 92).

Mary Simmons, Ms. Brown's mother, testified that her daughter left the house on the evening of August 31 to buy cigarettes (R. 116). She stated that her daughter did not have any noticeable injuries on her face or neck at that time (R. 117). When she next saw her daughter the following evening, she was bruised

and scratched. Her daughter refused to talk about what had happened to her (R. 124).

Ms. Simmons stated that Lucas called her between 4:00 and 6:00 p.m. and told her that her daughter was resting at his house. He told her that she had been attacked the night before (R. 118-121). She stated that her daughter and the Respondent had a "boyfriend-girlfriend" relationship previously (R. 125).

Karen Barden, a detective with the Highland Park police force, took a report from Brown on September 4, 1984 (R. 133-134). She took a photograph of the bruises and scratches she saw on the complainant. Officer Barden testified that the photograph did not reflect the severity of the complainant's injuries (R. 136).

On September 5, 1985, Officer Barden arrested Lucas at his home. During a patdown search of the Respondent, she found the knife that was identified by

the complainant as the one used against her (R. 138-139).

After issuing "Miranda warnings", Officer Barden took a statement from the Respondent (R. 140-145). In his statement, Lucas told the officer that he was engaging in an act of consensual sex with the complainant when Brown called him "Ricky" several times. He said she slapped him and he slapped her back. After that they continued to have consensual sex. He said that they planned to tell Ms. Brown's mother that she had been robbed because they did not want her to know that Ms. Brown was pregnant for the second time. Lucas told Officer Barden that this was a result of his home having been bombed by the complainant (R. 146).

Barden testified that she saw no evidence of burning at the Respondent's house (R. 147). She testified that she saw scratches on his wrists. Her efforts to take a picture of him failed (R. 152-155).

The Respondent testified that he first became acquainted with the complainant during the second week of April, 1984 (R. 163). He testified that they frequently visited each other, that they were very close, and that he intended to marry Ms. Brown (R. 164, 166, 216). He testified that he asked Brown's mother for permission to marry her (R. 167).

Lucas testified that he and the complainant engaged in three or four separate acts of consensual sexual intercourse on August 31, 1984 (R. 168). He engaged in some of those acts after the complainant called him "Ricky" and after he had slapped her (R. 226). Lucas stated that he slapped the complainant only once with his open hand (R. 205-206, 212, 215). He testified that the photograph of the complainant made her bruises look much worse than they were (R. 213). He stated that he saw no injuries on her neck when she left on September 1 (R. 214).

The Respondent testified that he and the complainant made up the story about her having been robbed because of her mother. He explained that Brown had previously told him that she was pregnant with his child. He said that she told him that night that the baby was another man's child (R. 207). He said that they talked about who would be the father to the child. He told the complainant that he would not act as the child's father and that he was going to tell Brown's mother this (R. 208). He said that at about 6:00 p.m. he called the complainant's mother and told her that he was not the father of the child (R. 209-210).

Lucas testified that the knife in question was Ms. Brown's knife. He had borrowed it but failed to return it (R. 193-194). He also testified that the scratches on his wrists were made by a kitten (R. 197).

The Respondent stated that there were no locks and keys for the windows

(R. 170, 177-178); that there are no security bars on his home (R. 174-175); that the key to the deadbolt lock on the door is always left hanging on a string next to the door (R. 221-222); and, that the gate to the patio is left unlocked (R. 172).

Lucas said that there were problems in his relationship with the complainant because she became possessive and jealous of him (R. 181). He said that she had gotten into a physical fight with another woman over him because he had talked to that woman at a party (R. 182). He stated that another reason there were problems in their relationship was because Brown had given him gonorrhea (R. 182). Lucas testified that he had been seen by a doctor at the Herman Keifer Clinic because of symptoms of burning on urination and discharge (R. 190). He stated that he was treated with tetracycline pills (R. 190-191).

In rebuttal, it was stipulated that

had Dr. Michael Sampson been recalled to the witness stand he would have testified that the complainant did not have any venereal disease and that she was not pregnant when he examined her (R. 233-234). Brown testified, on rebuttal, that she was not pregnant and that she had not had a venereal disease (R. 235-236).

Officer Barden testified that the scratches on the Respondent's wrists were extremely straight. She testified that she had previously seen scratches left by kittens and that she did not feel that the scratches on his wrists were made by a kitten (R. 242-243).

After the closing arguments of counsel, the court found the Respondent guilty of two counts of criminal sexual conduct in the third degree. The judge stated that he had some doubt concerning the presence of a weapon during the acts of penetration. While he noted that there were minor inconsistencies in her testimony, the complainant was found to

be credible. The judge noted that the injuries to the complainant's face were consistent with a "brutal blow" (R. 262-266).

On July 2, 1985, the Respondent was sentenced to a term of imprisonment of from three years and eight months to fifteen years (R. 285).

The Respondent's conviction was reversed and the matter was remanded for a new trial by the Michigan Court of Appeals which concluded that the notice requirement of MCL 750.520j(2); MSA 28.788(10)(2) was unconstitutional when applied to exclude evidence of prior sexual relationship between a defendant and a victim. People v. Lucas, 408 N.W.2d 431 (Mich.App. 1987) (Petition for Certiorari, pp. 1a-7a).

After having held the Petitioner's application for leave to appeal in abeyance pending the court's decision in People v LaLone (Docket No. 79221), the Michigan Supreme Court remanded the case

to the Court of Appeals to determine "whether the trial court's denial of the defendant's motion to introduce evidence regarding past sexual relations between him and the complainant was harmless beyond a reasonable doubt." (Petition for Certiorari, pp. 8a-9a).

On remand, the Michigan Court of Appeals again reversed the Respondent's conviction, stating that "(s)ince the question of credibility was central to this case, we cannot say exclusion of defendant's proposed testimony was harmless beyond a reasonable doubt. People v Robinson, 386 Mich 551, 563; 194 NW2d 709 (1972)." (Petition for Certiorari, p. 12a).

The Michigan Supreme Court denied leave. (Petition for Certiorari, p. 13a).

This Court then granted the Petition for Certiorari.

SUMMARY OF ARGUMENT

The issue presented in this case is whether the Confrontation Clause of the Sixth Amendment or the right to present a defense is violated by the exclusion of arguably relevant evidence to be used on cross-examination or in contradiction of a sexual assault for the failure to file a required notice of intent to employ such evidence and, thus, obtain a pre-trial hearing on its admissibility/legal relevance. The Michigan Court of Appeals answered this question in the affirmative in this case and further held that the erroneous exclusion of the evidence was not harmless beyond a reasonable doubt. Petitioner disagrees.

The right to confrontation ensures an accused the "opportunity" to conduct an effective cross-examination of adverse witnesses. Also, the Sixth Amendment implicitly assures the defendant that he will not be prevented from presenting relevant evidence in his own behalf.

The rape shield law is intended to protect a sexual assault victim from having to expose her sexual history when it is irrelevant to the issue of the accused's guilt or innocence. It avoids any undue harassment of the victim and excludes evidence which is misleading, inflammatory, and of minimal probative worth.

Petitioner submits that this law, however, does not in any way infringe upon the accused's right to confrontation since it provides a procedural mechanism whereby probative evidence may be shown to be admissible. All that a defendant is required to do is show a legitimate need for the evidence (that it is legally relevant to the defense asserted) and that it is therefore more probative than prejudicial.

Petitioner further submits that each procedural rule, including the notice requirement, is a valid and essential means to protect the victim of rape while

insuring the constitutional rights of the accused. The notice requirement prevents unwarranted surprise by permitting the prosecution to conduct its own investigation of the proposed evidence in order to challenge its admissibility. Where the actions or omissions of the accused are clearly inexcusable, preclusion of such evidence for failure to file a timely notice is not an unreasonable remedy.

Lastly, Petitioner submits that where, as in the instant case, it can be shown that the accused was in no way prejudiced by the preclusion of evidence there has been no violation of the right to confrontation or of his ability to present evidence in his defense.

ARGUMENT

NEITHER THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT NOR THE RIGHT TO PRESENT A DEFENSE ARE VIOLATED BY THE EXCLUSION OF ARGUABLY RELEVANT EVIDENCE TO BE USED ON CROSS-EXAMINATION OR IN CONTRADICTION OF A SEXUAL ASSAULT VICTIM FOR FAILURE TO FILE A REQUIRED NOTICE OF INTENT TO EMPLOY SUCH EVIDENCE (THEREBY OBTAINING A PRETRIAL HEARING ON ITS ADMISSIBILITY/LEGAL RELEVANCE).

I. THE RIGHT TO CONFRONTATION.

The Confrontation Clause of the Sixth Amendment, guarantees the accused the right to confront the witnesses against him. California v Green, 399 U.S. 149, 157, 90 S.Ct. 1930, 1934 (1970). The primary purpose of the confrontation guarantee is to give the defendant the **opportunity** to cross-examine the witnesses against him. Davis v Alaska, 415 U.S. 308, 315-16, 94 S.Ct. 1105, 1110 (1974):

> "'The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination.'" (emphasis in original).

In Chambers v Mississippi, 410 U.S. 284, 93 S.Ct. 1038 (1973), this Court observed that the right to confront and the extent of cross-examination is not limitless:

> "The right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. ... But its denial or significant diminution calls into question the ultimate 'integrity of the fact-finding process' and requires that the competing interest be closely examined." 410 U.S., at 295, 93 S.Ct., at 1046.

Thus, as noted by this Court in Delaware v Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431 (1986), a trial court may impose reasonable limits upon inquiry into the potential bias of a prosecution witness which include such factors as:

> "... harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that (would be) repetitive or only marginally relevant ..." 475 U.S., at 679, 106 S.Ct., at 1435.

Consequently, even relevant evidence may be barred as long as the defendant is

not prohibited outright from utilizing the opportunity to present the evidence or offer proof of its relevance. "Stated otherwise, neither the Sixth Amendment Confrontation Clause, nor due process, confers on a defendant an unlimited right to admit all relevant evidence or cross-examine on any subject." People v Hackett, 365 N.W.2d 120, 124 (Mich. 1984).

Again, it is the "opportunity" which must be afforded the defendant to cross-examine adverse witnesses which is of paramount concern in the context of the Sixth Amendment. This principle was stated in the following manner by this Court in Delaware v Fensterer, 474 U.S. 15, 106 S.Ct. 292 (1985):

> "Generally speaking, the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish. [474 U.S., at 20, 106 S.Ct., at 294] (emphasis in original).
>
> * * *
>
> "(T)he Confrontation Clause is generally satisfied when the

> defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony." [474 U.S., at 22, 106 S.Ct., at 295].

In accord with these principles, the Court reviewed the petitioner's sodomy conviction in the recent case of Olden v Kentucky, 488 U.S. ___, 109 S.Ct. 480 (1988). There, the defense asserted was consent. Olden's theory of the case was that the complainant had fabricated the rape and sodomy charges to protect her relationship with her boyfriend. Defense counsel contended that in order to show the complainant's motive to lie it was necessary to introduce evidence of the fact that the complainant and her boyfriend were then living together. Finding that the prejudicial nature of the evidence outweighed its admittedly probative value, the trial court granted the prosecution's motion in limine to keep all evidence of current cohabitation from

the jury.[1]

As the Confrontation Clause includes the right to conduct "reasonable" cross-examination (488 U.S., at ___, 109 S.Ct., at 483), the Court found that an absolute ban on any inquiry into the complainant's living arrangement for the stated purpose of demonstrating the complainant's motive to lie was "beyond reason". (488 U.S., at ___, 109 S.Ct., at 483). Implicit in the Court's holding was the fact that the petitioner had made a clearly sufficient showing of the unique relevance of the proffered evidence to the central issue in the case. Because of this, a harmless error analysis could not be applied. Delaware v. Van Arsdall, 488 U.S., at ___, 109 S.Ct., at 483-84.

What is clear from this line of authority is that a defendant must be

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1. This Court noted that the state appellate court specifically held that the evidence of cohabitation at the time of trial was not barred by the state's rape shield law.

permitted to pursue a course of cross-examination which is both effective and reasonable as it relates to issues which are crucial to the case against him. However, even evidence which may be characterized as legally or logically relevant may be excluded if it runs afoul of legitimate state interests. Where these two interests collide, a court must undertake an analysis of the competing interests in order to strike a balance which will ensure that the right to a fair trial is not denied either to the accused or to the state.

As an integral part of the "interest balancing process", legislative and judicial bodies may promulgate rules which are designed to foster an informed determination without infringing upon a defendant's right to confrontation. To provide for an orderly determinative process which is fundamentally fair to both parties, such rules may require a pretrial hearing to test the relevance of

proposed evidence to the actual issues in the case.[2]

Frequently, these procedural prerequisites will include a provision for notice which is intended to avoid the unnecessary and unjust surprise which would otherwise befall the opposing side. A notice provision also ensures that the opponent of the proffered evidence will be provided with sufficient time to conduct its own review of the evidence and to gather additional evidence to rebut the claim of admissibility. It also ensures that inadmissible evidence

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2. "The in camera hearing ... is an important safeguard as it provides the least drastic infringement on the defendant's rights when there is relevant evidence applicable to a truth-seeking exception. Certainly, the state's interest ... together with the safeguards set out in the statute balances the scales in favor of such a state interest and thereby does not infringe upon the Appellant's Sixth Amendment rights. The defendant's right to confront and cross-examine witnesses concerning the victim's past sexual behavior with others must bow to accommodate the state's interest in the Rape Shield Statute." Harris v State, 362 S.E.2d 211, 213 (Ga. 1987).

will be rejected before being placed before the jury which will otherwise cause prejudicial, and often irreparable, harm to the opponent of the evidence.

The overriding concern of such rules is the preservation of the parties' right to a fair trial. One such rule is the rape shield law.

II. RAPE SHIELD LAWS AND NOTICE PROVISIONS.

Prior to the adoption of rape shield laws, the prevalent view was that opinion and reputation evidence of a victim's consensual sexual activity was probative of a woman's consent with a defendant and of her credibility as a witness. See 2 Weinstein & Berger, Evidence, s. 412[01], pp. 412-10. Later, a critical evaluation of such a rule of evidence and an evolving theory that sexuality was clearly distinct from crimes of sexual violence compelled the Michigan Legislature to enact sweeping reforms of the rape laws

in 1974. Aside from "redefining the crime of 'rape' into the more expansive and gender-neutral concept of criminal sexual conduct, the Legislature also tailored the evidentiary considerations in sexual-assault prosecutions to focus upon the merits of the accused's guilt or innocence rather than the victim's behavior." People v LaLone, 437 N.W.2d 611, 619-620 (Mich. 1989).

In addressing the defendant's claim that the rule set forth in Michigan's rape shield law [M.C.L.A. Sec. 750.520j; M.S.A. Sec. 28.788(10)] which excluded evidence of a complainant's previous sexual conduct with persons other than the defendant violated his constitutional right to confrontation, the court in the case of People v Khan, 264 N.W.2d 360 (Mich.App. 1978) noted the purposes of the act:

> "(W)e observe that this provision--an integral part of Michigan's criminal sexual conduct act--represents an explicit legislative decision to eliminate trial practices under

> former law which had effectually frustrated society's vital interest in the prosecution of sexual crimes. In the past, countless victims, already scarred by the emotional (and often physical) trauma of rape, refused to report the crime or testify for fear that the trial proceedings would veer from an impartial examination of the accused's conduct on the date in question and instead take on aspects of an inquisition in which complainant would be required to acknowledge and justify her sexual past.
>
> * * *
>
> "'Primarily, *** [rape shield statutes] serve the substantial interests of the state in guarding the complainant's sexual privacy and protecting her from undue harassment. In line with these goals, they encourage the victim to report the assault and assist in bringing the offender to justice by testifying against him in court. Insofar as the laws in fact increase the number of prosecutions, they support the government's aim of deterring would-be rapists as well as its interest in going after actual suspects. These statutes are also intended, however, to bar evidence that may distract and inflame jurors and is of only arguable probative worth. To the degree that they aid in achieving just convictions and preventing acquittals based on prejudice, they naturally further the truth-determining function of trials in addition to more collateral ends.'" 264 N.W.2d at 364.

Since Michigan's enactment of its rape shield statute, similar provisions have been adopted in each state and by the federal government (Fed.R.Evid. 412). Comment, "The Rape Shield Paradox: Complainant Protection Amidst Oscillating Trends of State Judicial Interpretation", 78 J.Crim.L.&Criminology 644 (1987).

From the position taken under former law which espoused a rule of inclusion, the current rule which favors exclusion of such evidence has arisen. It is, however, a rule which is not unmindful of the confrontation rights of the accused. As noted in People v Hackett, 365 N.W.2d 120, 125 (Mich. 1984):

> "The determination of admissibility is entrusted to the sound discretion of the trial court. In exercising its discretion, the trial court should be mindful of the significant legislative purposes underlying the rape-shield statute and **should always favor exclusion of evidence of a complainant's sexual conduct where its exclusion would not unconstitutionally abridge the defendant's right to confrontation**." (emphasis added)

Despite challenges to the constitutionality of rape shield laws based upon a claim that they violate the defendant's Sixth Amendment right to confrontation, courts have repeatedly rejected them due to the acknowledged validity of the state interest involved and the purposes for which the laws were adopted. See e.g., People v Arenda, 330 N.W.2d 814 (Mich. 1982); People v McKenna, 585 P.2d 275 (Colo. 1978); State v Hamilton, 289 N.W.2d 470 (Minn. 1979); State v Howard, 426 A.2d 457 (N.H. 1981).

A. PROCEDURAL PREREQUISITES TO ADMISSION OF SEXUAL HISTORY EVIDENCE.

In the rare cases in which evidence of a complainant's sexual history may be relevant, rape shield laws provide a mechanism to test the admissibility of the proposed evidence. These procedures invariably include the submission of a motion to allow the use of such evidence, an offer of proof, a supporting affida-

vit, and an in camera hearing. Most states permit the hearing to be held at any time before trial (See 2 Weinstein & Berger, Evidence, ss. 412[01]-412[03], pp. 412-10-412-33). However, many others have established a notice requirement which directs the accused to inform the court and the prosecution of his intent to admit such evidence. While Michigan appears to be the only state which requires the notice to be filed "within 10 days after the arraignment on the information" [M.C.L.A. 750.520j(2); M.S.A. 28.788(10)(2)], other states and the federal government direct the notice to be filed at various times before the start of trial.[3]

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3. E.g., Ark. Code Ann., s. 16-42-101 (c)(2)(A) (3 days); Colo. Rev. Stat., s. 18-3-407(2)(a) (30 days); Ind. Code Ann., s. 35-37-4-4(c)(1) (10 days); Kan. Stat. Ann. s., 21-3525(2) (7 days); Neb. Rev. Stat., s. 28-321(1) (15 days); Ohio Rev. Code Ann., s. 2907.02(E) (3 days); Ore. Evid. Code, Rule 412(3)(a) (15 days); Wyo. Stat. Ann., s. 6-2-312(a); Fed. R. Evid. 412(c)(1) (15 days).

Nevertheless, a defendant is not precluded from offering such evidence even though there may be a failure to comply with the notice requirement. In such an event, the notice requirement may be "waived by the court" [Kan.Stat.Ann. s. 21-3525(2)]; the hearing may be held if "good cause" is shown [Ky.Rev.Stat. Ann., s. 510.145(3)(a)]; or, if "new information is discovered during the course of trial" [M.C.L.A. 750.520j(2); M.S.A. 28.788(10)(2)].

What all of these provisions have in common is (1) a motion or an offer of proof must be made which states the claim that evidence of prior sexual conduct is relevant to an issue in the case and (2) a hearing outside the presence of the jury may be held in order to determine whether such evidence, if relevant, must be admitted to protect the accused's right to confrontation (or, stated differently, that its probative value outweighs its inflammatory or prejudicial

nature since it is necessary to a crucial aspect of the defense theory of the case).

1. RELEVANCE AND NECESSITY (RELATIONSHIP OF PROPOSED EVIDENCE TO THE DEFENSE ASSERTED).

The Michigan rape shield law is quite similar to those found in other jurisdictions. It precludes opinion or reputation evidence as well as evidence of "specific instances" of the victim's sexual conduct [M.C.L.A. 750.520j(1); M.S.A. 28.788(10)(1)]. Certain evidence is admissible upon a determination that its probative value outweighs its inflammatory or prejudicial nature [M.C.L.A. 750.520j(1); M.S.A. 28.788(10)(1)]:

> "(a) Evidence of the victim's past sexual conduct with the actor.
> "(b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease."

It then sets out the procedural prerequisites which must be satisfied to

permit admission of the evidence.[4]

Once the threshold notice requirement is met, the following procedures are utilized in resolving the question of admissibility [People v Slovinski, 420 N.W.2d 145, 150 (Mich.App. 1988)]:

> "The defendant is required to offer proof as to the proposed evidence and **demonstrate its relevance to the purpose for which its admission is sought**. The offer of proof must be sufficient as to a defendant's confrontation right, as distinct from use of prior sexual history as character evidence or for impeachment. Id. [Hackett], 350, 365 N.W.2d 120.
> "If defendant's offer of proof withstands this level, the trial court continues to possess discretion to exclude the relevant evidence offered where its

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4. "(2) If the defendant proposes to offer evidence described in subsection (1)(a) or (b), the defendant within 10 days after the arraignment on the information shall file a written motion and offer proof. The court may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1). If new information is discovered during the course of the trial that may make the evidence described in subsection (1)(a) or (b) admissible, the judge may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1)."

> probative value is substantially outweighed by the risks of unfair prejudice, confusion of issues, or misleading the jury. Id., 351, 365 N.W.2d 120. See also MRE 403. The trial court should favor exclusion of this type of evidence unless exclusion would 'unduly infringe on the defendant's constitutional right of confrontation.' Id., 351, 365 N.W.2d 120." (emphasis added)

While "seemingly" relevant evidence will often withstand the first level of examination, the inquiry is not over. To establish admissibility, the defense must then demonstrate its specific "need" for the evidence to the purpose for which its admission is sought.[5]

While an accused's claim of prior consensual sexual activity with the com-

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5. In United States v Nixon, 418 U.S. 683, 713, 94 S.Ct. 3090, 3110 (1974), this Court found that the President's generalized interest for confidentiality in the communications of his office could not overcome the right of the Watergate Special Prosecutor to obtain relevant evidence for which a preliminary and specific showing of need had been made ("The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.").

plainant in a rape case will usually satisfy the first level of the inquiry where the defense offered is one of consent (i.e. general relevance), the specific evidence sought to be admitted must then be examined in light of the determinative issue raised in the case in order to preserve the accused's right to confrontation (i.e. specific need).[6]

Thus, a generalized claim of prior sexual conduct between a defendant and a complainant does not end the inquiry - even where the defense asserted is one of consent to the present charge. Depending upon the evidence to be adduced at trial and the defense presented, the details of

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6. See e.g., Munn v State, 505 N.E.2d 782, 785 (Ind. 1987) [prior consensual sexual conduct with the accused is not relevant where the defense is alibi]; People v Smith, 340 N.W.2d 855, 856-857 (Mich.App. 1983) [complainant's past sexual conduct with the defendant is not admissible when the defense of consent is not raised at trial because it is not "'material to [any] fact at issue in the case', M.C.L. s. 750.520j(1); M.S.A. 28.788(10)(1)"].

the specific sexual acts performed or the simple fact that a prior sexual encounter occurred may or may not be admissible. That decision cannot, and should not, be made until a proper request is made and a full hearing is held on the issue outside the presence of the jury.

In People v. Khan, supra, it was claimed that the rape shield act violated the right to confrontation because it precluded evidence of the complainant's prior sexual activity with persons other than the defendant. 264 N.W.2d at 363. It was alleged (without elaboration) that such prior conduct may have been used to establish the probability of consent. The court rejected this contention and noted that the defendant did not suggest that the "'proof of prior sexual conduct pertains narrowly to acts evincing a pattern of voluntary encounters characterized by distinctive facts similar to the current charges'." 264 N.W.2d at 367 (emphasis in original).

Evidence of a unique pattern of sexual events during an encounter with the complainant which the defendant claimed occurred one week before the events which led to the charge of assault with intent to commit criminal sexual conduct where deemed admissible in People v Perkins, 379 N.W.2d 390, 393 (Mich. 1986):

> "If a factfinder, typically a jury, were to believe the defendant's description of the encounter the previous week, that evidence could influence its decision as to whether the events on March 6 amounted to an assault or were consensual.
>
> * * *
>
> "Many of the defendant's actions on March 6 (as he described them) might appear strange to a jury except in the context of his claim that a similar encounter had taken place the previous week."

In State v Hopkins, 377 N.W.2d 110 (Neb. 1985), the court formulated an evidentiary syllogism which it gleaned from the state's rape shield law when it considered the defendant's claim that evidence of the victim's prior consensual

sexual activity with the accused should have been introduced at trial:

> "Major: The victim's past sexual behavior with the defendant was consensual. Minor: The victim's behavior in the present prosecution is the **type of activity** in which the victim participated with the defendant in the past. Conclusion: Therefore, the victim's behavior in the present prosecution was consensual." (377 N.W.2d at 116) (emphasis added).

In finding that the defense failed to produce the type of evidence which tended to establish a "pattern of conduct or behavior on the part of the victim as to be relevant to the issue of consent" (377 N.W.2d at 116), the court held that

> "... in order that a victim's past consensual sexual behavior with a defendant be admitted as evidence relevant to a charge of sexual assault, the defendant must, by offer of proof at the in camera hearing, adduce some evidence tending to prove a defendant's claim that the victim consented to the sexual act which is the subject of the prosecuted charge against the defendant." (377 N.W.2d at 117).

Thus, the failure to show that prior sexual acts have a unique bearing upon

the specific nature of the theory of the consent defense precludes the admission of such evidence since it is not legally or logically relevant to the central issue in the case.[7]

Even where the proposed evidence of prior consensual sexual conduct may be admittedly material to the defense of consent, such prior conduct may be so remote in time that it is immaterial to the charged offense. Compare State v Williams, 681 P.2d 660, 664 (Kan. 1984) (alleged conduct having occurred about one and one-half years before the charged offense) with State v Stellwagen, 659 P.2d 167, 168, 170 (Kan. 1983) (defendant and complainant had not dated for seven months prior to the date of the offense).

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7. People v Williams, 330 N.W.2d 823 (Mich. 1982) [necessity of "logical relevance" between the prior sexual acts and the issue of consent); People v Zysk, 386 N.W.2d 213, 217 (Mich.App. 1986) ("prior sexual episodes which defendant sought to have admitted were distinct and unrelated to the brutal acts involved in the charged offense.")

In many cases, evidence of prior consensual sexual activity between the accused and the complainant will be relevant and admissible to the issue of consent. Nevertheless, as the foregoing authorities clearly indicate, the question of its admissibility must be closely examined before it can overcome the exclusionary provisions of the rape shield law. In the process of balancing the competing interests involved, none of the procedural prerequisites in themselves impose an undue burden upon the accused. This is obviously not only true of the offer of proof and in camera hearing requirements but it is also quite true for the notice requirement.

2. PURPOSE OF NOTICE PROVISIONS.

A requirement that the defendant disclose evidence which he intends to use at trial does not result in the relinquishment or diminution of constitutional rights. At most, it merely requires him

to accelerate his pre-trial preparation.

In Williams v Florida, 399 U.S. 78, 90 S.Ct. 1893 (1970), the petitioner claimed that a state "notice-of-alibi" rule which required him to give notice of his intent to claim alibi, to furnish information as to the place where he claims to have been and to disclose the names of the alibi witnesses he intends to call deprived him of due process and a fair trial and compelled him to be a witness against himself. In dismissing these contentions, the Court made the following observation:

> "(T)he notice-of-alibi rule by itself in no way affected petitioner's crucial decision to call alibi witnesses or added to the legitimate pressures leading to that course of action. At most, the rule only compelled petitioner to accelerate the timing of his disclosure, forcing him to divulge at an earlier date information that the petitioner from the beginning planned to divulge at trial. Nothing in the Fifth Amendment privilege entitles a defendant as a matter of constitutional right to await the end of the State's case before announcing the nature of his defense, any more than it en-

> titles him to await the jury's verdict on the State's case-in-chief before deciding whether or not to take the stand himself." 399 U.S., at 85, 90 S.Ct., at 1898.

The Court also reflected upon the role of discovery in the truth-seeking process:

> "The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played. (footnote omitted) We find ample room in that system, at least as far as 'due process' is concerned, for the instant Florida rule, which is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence." 399 U.S., at 82; 90 S.Ct., at 1896.

The notice requirement found in rape shield laws is also designed to foster the same fundamental goals. A number of valid, underlying purposes are served by the notice provision.

The primary purpose of a rape shield law is to exclude irrelevant evidence of a victim's prior sexual conduct (even if

such activity may have been undertaken with the accused). The notice provision affords the victim (and the prosecution) maximum notice that such questioning may occur. 2 Weinstein & Berger, Evidence, p. 412-8.

By providing maximum notice of the intent to use such evidence, the chance that the prosecution may be surprised at trial by the revelation of such evidence is properly dispelled. Note, "If She Consented Once, She Consented Again - A Legal Fallacy in Forcible Rape Cases", 10 Val.U.L.Rev. 127, 164 (1976). See also, Wright v State, 513 A.2d 1310, 1313 (Del.Supr. 1986). By avoiding undue surprise, the notice requirement also ensures that potentially prejudicial evidence will not be revealed to the jury unless its admissibility is first determined by the court outside its presence.

In People v Williams, 330 N.W.2d 823 (1982), Justice Kavanagh wrote a separate opinion explaining his reasons for

upholding the constitutionality of the notice provision in light of the claim that it violated the accused's right to confrontation:

> "The notice requirement serves the purpose of ensuring that a victim's sexual past will not be exposed to public scrutiny without an in camera determination that such evidence is more probative than prejudicial.
>
> "The state has a legitimate interest in encouraging victims to report criminal sexual conduct and to assist in prosecutions therefor. So long as efforts such as this statute to further this purpose do not infringe on a defendant's constitutional right to confront his accusers and produce evidence in his own behalf, they are permissible.
>
> "The procedural requirement of notice so that an in camera hearing may determine the appropriate action to serve both ends appears to us as proper and adequate.
>
> "We find no error in the trial court's ruling that the evidence proffered here was inadmissible because of the failure to observe the notice requirement." (330 N.W.2d at 832).

There is yet another consideration which supports the validity of a notice provision. As with a claim of alibi, a

notice requirement provides the prosecution sufficient time to investigate the allegation and gather additional evidence in order to confront the claim adequately at an in camera hearing.

This procedural requirement is of particular importance when an accused determines that his best course of action is to fabricate a claim that he and the complainant had previously engaged in consensual sexual activity.

In many cases, a defendant's claim that he and the complainant had engaged in prior consensual sexual conduct may be acknowledged as true by the complainant. Yet in many other cases, such a charge by the defendant may be met with a vehement denial by the victim. That such a baseless charge can easily be made and, thus, deny the victim any protection from such an accusation was noted by the court in Harris v State, 362 S.E.2d 211, 213 (Ga. 1987):

> "There is also the compelling interest of the state to

> protect its citizens from criminal acts and to encourage the victims to bring the perpetrators of the crimes to justice. 'There is no other crime we can think of in which all of the victims are denied protection simply because someone might fabricate a charge[,]' Warren v. State, 255 Ga. 151, 156, 336 S.E.2d 221 (1985) (emphasis in original)."

If a defendant (who has failed to file a timely notice) merely has to allege that he engaged in prior sexual relations with the complainant in order to place that accusation before the trier of fact, then the purpose of the rape shield law has been eviscerated.

In reversing Respondent's conviction in the instant case, the Michigan Court of Appeals [People v Lucas, 408 N.W.2d 431, 432 (1987)] relied upon People v Williams, 289 N.W.2d 863 (Mich. App. 1980) wherein the court found that neither the notice requirement nor the in camera hearing procedure applied:

> "The object behind imposition of a notice requirement is to allow the prosecution to investigate the validity of a

> defendant's claim so as to better prepare to combat it at trial. This rationale is sound when applied to notices of alibi and insanity defenses. It loses its logical underpinnings however when applied to the instant situation. As stated, the very nature of the evidence sought to be presented, i.e., prior instances of sexual conduct between a complainant and a codefendant, is personal between the parties. As such, it does not involve a subject matter that requires further witnesses to develop. An in camera hearing will necessarily focus on a complainant's word against the word of a codefendant. Requiring notice in this situation, then, would serve no useful purpose. There would be no witnesses to investigate and, thus, no necessity for preparation time." 289 N.W2d at 866-867.

As the claim of prior sexual conduct between the defendant and the victim will not simply "focus on a complainant's word against the word" of the accused in every case, the court's reasoning in Williams and Lucas is indeed shallow. A victim's denial of prior sexual activity with the defendant does not immediately become a "credibility contest" which must then be

submitted to the jury for its consideration. To hold otherwise would place the victim "on trial" by requiring her to "justify her sexual past" [People v Khan, 264 N.W.2d 360, 364 (Mich.App. 1978)] thereby defeating the fundamental purpose of the rape shield law. Thus, the slight inconvenience of conducting an in camera hearing (preceded by filing a timely notice) avoids any infringement of the accused's right to confrontation and preserves the victim's right to privacy.

That a claim of prior sexual conduct between a defendant and a complainant is not necessarily a matter to which only they could testify is easily illustrated. Suppose that the defendant and the complainant meet each other at a New Year's Eve party at the home of a third person and that the defendant leaves the party alone a short time later while the complainant remains in the company of her host for the remainder of the evening. At trial, the defendant claims that he

and the complainant stayed together for the entire evening during which time they engaged in sex at the party. The prosecution should have the opportunity to produce the host or others attending the party to testify that the defendant only stayed for a few minutes and then left by himself. Alternatively, the prosecution should be provided the opportunity to produce witnesses or documentation (e.g. a visa entered upon the complainant's passport or an airline ticket) to show conclusively that the complainant did not attend the party and, if fact, was out of town or at another location at the time when the alleged sexual episode took place.

If it can be shown to the satisfaction of the trial judge at the in camera hearing that the defendant's claim is a mere fabrication and that his testimony on the matter would amount to perjury, he could properly be precluded from presenting the false allegation to the jury. As

the Court noted in Nix v Whiteside, 475 U.S. 157, 173, 106 S.Ct. 988, 997 (1986):

> "Whatever the scope of a constitutional right to testify, it is elementary that such a right does not extend to testifying falsely. In Harris v. New York, we assumed the right of an accused to testify 'in his own defense, or to refuse to do so' and went on to hold:
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> > '[T]hat privilege cannot be construed to include the right to commit perjury. [citations omitted] Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully....' 401 U.S., at 225, 91 S.Ct., at 645.
>
> * * *
>
> "Harris and other cases make it crystal clear that there is no right whatever - constitutional or other wise - for a defendant to use false evidence."

Seeking a judicial determination of the admissibility of evidence of alleged prior sexual relations between an accused and a complainant in an in camera hearing wherein the prosecution is afforded an opportunity to challenge the claim by showing that it is irrelevant to an issue in the case, that it is far too remote, or, that it is simply a fabrication fur-

thers the truth-seeking function of the criminal trial. It prevents unduly prejudicial or perjurious evidence from going before the jury without infringing upon the defendant's right to confrontation. In order to achieve this result, the notice requirement ensures the right of the prosecution to investigate and to rebut with evidence of its own an allegation which should not be placed before the trier of fact.

B. FAILURE TO FILE TIMELY NOTICE AND PRECLUSION OF EVIDENCE.

As previously noted, rules which require pretrial disclosure of the intent to raise certain defenses (e.g. alibi) have been held to be constitutional. Williams v Florida, 399 U.S., at 83, 90 S.Ct., at 1897. Since the issue of the constitutionality of a preclusion sanction for failure to comply with a notice-of-alibi rule was not properly before the Court in Williams v. Florida, it was not

addressed. 399 U.S., at 83, n. 14, 90 S.Ct., at 1897, n. 14.

In Wardius v Oregon, 412 U.S. 470, 93 S.Ct. 2208 (1973), the Court held that a state statute which barred the admission of alibi evidence as a sanction for the defendant's failure to comply with a notice-of-alibi rule was unconstitutional since it did not provide reciprocal discovery rights for criminal defendants. As the Court found that the rule was facially invalid, it did not express an opinion regarding the Petitioner's added claim that "... even if Oregon's notice-of-alibi rule were valid, it could not be enforced by excluding either his own testimony or the testimony of supporting witnesses at trial." 412 U.S., at 472, n. 4, 93 S.Ct., at 2211, n. 4.

In United States v Nobles, 422 U.S. 225, 95 S.Ct. 2160 (1975), the defendant alleged that his Sixth Amendment rights to compulsory process and cross-examination were violated by the trial court's

decision to exclude the testimony of an expert witness whom he intended to call because he had refused to comply with a discovery order granting the prosecution access to a "highly relevant" report. In upholding the remedy applied by the District Court, it was noted:

> "The court's preclusion sanction was an entirely proper method of assuring compliance with its order. Respondent's argument that this ruling deprived him of the Sixth Amendment right of compulsory process and cross-examination misconceives the issue. The District Court did not bar the investigator's testimony. Cf. Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 1923, 18 L.Ed.2d 1019 (1967). It merely prevented respondent from presenting to the jury a partial view of the credibility issue by adducing the investigator's testimony and thereafter refusing to disclose the contemporaneous report that might offer further critical insights. The Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system; one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half-truth." 422 U.S., at 241, 95 S.Ct., at 2171.

Rules requiring the disclosure of

evidence which either party intends to employ at trial further the legitimate purposes of the criminal justice system by ensuring that each side will be permitted to explore and test the relevance of proposed evidence. They increase the likelihood that complete and accurate evidence is laid before the jury. Stated differently, discovery procedures which apply equally to the defense and the prosecution guard against the danger that inadmissible, misleading or fabricated evidence will infect the parties' right to a fair trial.

In Taylor v Illinois, 484 U.S. 400, 108 S.Ct. 646 (1988), the trial court barred a defense witness from testifying before the jury as a sanction for the failure to identify the witness pursuant to the prosecution's discovery motion requesting a list of defense witnesses. The trial judge based his decision upon a finding that defense counsel had committed a blatant and willful violation of

the discovery rules. Following a hearing outside the presence of the jury which included an offer of proof in the form of the witness's testimony, the judge noted a second reason to exclude the testimony; namely, that he doubted the veracity of the witness. In finding that the Sixth Amendment right to compulsory process does not create an absolute bar to the preclusion of testimony of a defense witness as a sanction for violating a discovery rule, the Court made the following pertinent observations:

> "Discovery, like cross-examination, minimizes the risk that a judgment will be predicated on incomplete, misleading, or even deliberately fabricated testimony. The 'State's interest in protecting itself against an eleventh hour defense' is merely one component of the broader public interest in a full and truthful disclosure of critical facts." 484 U.S., at 411-412, 108 S.Ct., at 653-654 (footnote omitted).
>
> * * *
>
> "One of the purposes of the discovery rule itself is to minimize the risk that fabricated testimony will be believed. Defendants who are willing to fabricate a defense may also be willing to fabricate excuses for

> failing to comply with a discovery requirement. The risk of a contempt violation may seem trivial to a defendant facing the threat of imprisonment for a term of years. * * * If a pattern of discovery violations is explicable only on the assumption that the violations were designed to conceal a plan to present fabricated testimony, it would be entirely appropriate to exclude the tainted evidence regardless of whether other sanctions would also be merited." 484 U.S., at 413-414, 108 S.Ct., at 655.

A important distinction between the Compulsory Process Clause and other rights protected by the Sixth Amendment was noted by the Court in Taylor:

> "There is a significant difference between the Compulsory Process Clause weapon and other rights that are protected by the Sixth Amendment - its availability is dependent entirely on the defendant's initiative. Most other Sixth Amendment rights arise automatically on the initiation of the adversary process and no action by the defendant is necessary to make them active in his or her case. While those rights shield the defendant from potential prosecutorial abuses, the right to compel the presence and present the testimony of witnesses provides the defendant with a sword that may be employed to rebut the prosecution's case. The decision whether to employ

> it in a particular case rests solely with the defendant. The very nature of the right requires that its effective use be preceded by deliberate planning and affirmative conduct." 484 U.S., at 410, 108 S.Ct., at 653 (footnote omitted).

While the right to confrontation is at issue in the instant case, so too is the right to present evidence by way of defense. The duty of the defendant to take affirmative steps to secure the opportunity to present evidence of a complainant's prior sexual conduct is more akin to his burden of having to employ his own initiative to secure evidence in his own defense under the Compulsory Process Clause and should be governed by similar principles.

While lack of consent is not a issue which must be proven beyond a reasonable doubt in order to obtain a conviction for the offense of criminal sexual conduct, it is a defense to the charge which may be raised by the accused. See People v Khan, 264 N.W.2d at 366 n. 5 (Mich.App. 1978),

People v Hearn, 300 N.W.2d 396, 398 (Mich.App. 1980). Since it is a defense which must be asserted by the accused, it is similar in nature to the alibi defense. Like other affirmative defenses, a state may adopt reasonable rules of discovery and disclosure which afford the prosecution the opportunity to confront the evidence and challenge its admissibility before submission to the trier of fact.

Unlike the situation in Davis v. Alaska, where the accused could exercise no control over the court to obtain relevant evidence tending to establish bias (due to the absolute ban imposed by a state statute on the introduction of a witness's probationary status following an adjudication of juvenile delinquency), it is the defendant in a criminal sexual conduct prosecution who "controls" the introduction of relevant evidence of his prior consensual sexual relations with the complainant if he chooses to assert a

defense of consent. All that the accused is required to do is comply with the procedural requirements of the rape shield law.[8]

Just as there is no absolute bar to the preclusion of evidence as a sanction for the violation of a discovery rule under the Compulsory Process Clause, there should be no absolute bar to a similar preclusion remedy for the failure to comply with the notice requirement of the rape shield law under the Confrontation Clause of the Sixth Amendment:

> "A trial judge may certainly insist on an explanation for a party's failure to comply with

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8. Cf. Taylor v. Illinois, 484 U.S., at 415-416, 108 S.Ct., at 656 ("The simplicity of compliance with the discovery rule is also relevant. As we have noted, the Compulsory Process Clause cannot be invoked without the prior planning and affirmative conduct of the defendant. Lawyers are accustomed to meeting deadlines. Routine preparation involves location and interrogation of potential witnesses and the serving of subpoenas on those whose testimony will be offered at trial. The burden of identifying them in advance of trial adds little to these routine demands of trial preparation." [footnote omitted]).

> a request to identify his or her witnesses in advance of trial. If that explanation reveals that the omission was willful and motivated by a desire to obtain a tactical advantage that would minimize the effectiveness of cross-examination and the ability to adduce rebuttal evidence, it would be entirely consistent with the purposes of the Compulsory Process Clause simply to exclude the witness' testimony." 484 U.S., at 415, 108 S.Ct., at 655-656 (footnote omitted).

State and federal courts have upheld or approved the sanction of preclusion for the failure of the defense to comply with the various procedural prerequisites of the rape shield laws. These rules include the requirement to file a timely motion or provide the court and the prosecution with proper notice of the intent to introduce evidence of prior sexual conduct.[9] Failure to file a required

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9. People v Smith, 340 N.W.2d 855, 856 (Mich.App. 1983), State v Risdal, 404 N.W.2d 130, 132 (Iowa 1987), State v Oglivie, 310 N.W.2d 192, 195 (Iowa 1981), State v Sanders, 610 P.2d 633, 636 (Kan. 1980), State v Williams, 580 P.2d 1341, 1342-1343 (Kan. 1978), State v Larson, 389 N.W.2d 872, 876 (Minn. 1986), State v Piper, 261 N.W.2d 650, 655 (N.D.1978),

motion precludes the admission of the evidence.[10] Failure to file a required affidavit may also result in preclusion of the evidence.[11]

Since preclusion of even arguably relevant evidence for failure to comply with discovery rules does not offend the Compulsory Process Clause, preclusion of such evidence for failure to provide proper notice or to file a timely motion to admit the evidence should not be found to be violative of the Confrontation Clause.

While the remedy is severe, it would be clearly appropriate in many cases. In

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9. (con't.) State v Acre, 451 N.E.2d 802, 805 (Ohio 1983), United States v Duran, 886 F.2d 167, 168 n. 4, 169 (8th Cir. 1989), United States v Provost, 875 F.2d 172, 177 (8th Cir. 1989).

10. People v McKenna, 585 P.2d 275, 279-280 (Colo. 1978), Wright v State, 513 A.2d 1310, 1313 (Del.Supr. 1986), State v Williams, 580 P.2d 1341, 1342- 1343 (Kan. 1978), State v Salkil, 659 S.W.2d 330, 334 (Mo.App. 1983).

11. State v Williams, 681 P.2d 660, 664 (Kan. 1984).

light of the fact that rape shield laws provide an accused with ample opportunity to make an offer of proof to test the relevance and admissibility of the evidence, the refusal or failure to exercise the option is his and his alone.

Lastly, the preclusion remedy has deterrent value. If it is widely understood that evidence will be barred if the procedural prerequisites are not met, a defendant would be less likely to utilize an "eleventh hour" defense which would undergo an especially severe examination by the court. In the absence of a sufficient showing of "good cause" or that the evidence was "newly discovered", the likelihood that it was recently concocted rises considerably.

III. THE INSTANT CASE.

The Respondent's conviction was reversed by the Michigan Court of Appeals based upon its conclusion that the notice requirement of the rape shield statute

[MCL 750.520j(2); MSA 28.788(10)(2)] was unconstitutional when applied to preclude evidence of the defendant's prior sexual conduct with the complainant:

> " In People v Williams, 95 Mich.App. 1, 9-11; 289 N.W.2d 863 (1980), rev'd on other grounds, 416 Mich. 25, 330 N.W.2d 823 (1982), this Court found the ten-day notice provision and any hearing requirement unconstitutional when applied to preclude evidence of specific instances of sexual conduct between a complainant and a defendant." [People v. Lucas, 408 N.W.2d 431, 432 (Mich.App. 1987)].

The Petitioner's application for leave to appeal to the Michigan Supreme Court noted that the evidence admitted at trial revealed a prior intimate relationship between the Respondent and the complainant. Despite having granted leave on the question of the constitutionality of the notice requirement in People v Williams, 330 N.W.2d 823 (Mich. 1982), the application also emphasized the fact that a majority of the Michigan Supreme Court specifically stated that it was

unnecessary to resolve that issue as the evidence which was sought to be introduced was irrelevant (330 N.W.2d at 825).

After remand by the Supreme Court to the Michigan Court of Appeals for the purpose of determining whether "the trial court's denial of the defendant's motion to introduce evidence regarding past sexual relations between him and the complainant was harmless beyond a reasonable doubt." [433 Mich 876-877 (1989)], the Court of Appeals again reversed the Respondent's conviction and stated as follows [Opinion of the Michigan Court of Appeals (On Remand), Petition for Certiorari, pp. 11a-12a]:

> "As we noted in our previous opinion, defendant and complainant had a "boyfriend-girlfriend" relationship over a considerable period of time in which they saw each other practically every day. Their relationship experienced difficulties only shortly before the incident in question. Virtually all of the evidence in this case consisted of complainant's word against the word of defendant. As this Court suggested in People v Williams, 95 Mich App 1, 10; 289 NW2d 863 (1980), rev'd on oth grds, 416 Mich 25 (1982), the prior instances of sexual relation between these individuals goes to the issue of credibility. Since the question of credibility was central to this case, we cannot say exclusion of defendant's proposed testimony was harmless beyond a reasonable doubt. People v Robinson, 386 Mich 551, 563; 194 NW2d 709 (1972)."

A. REQUIRING NOTICE.

On the day of trial (seven months after the Respondent's arraignment on the information), defense counsel made an oral motion to admit evidence of the prior sexual relations between the defendant and complainant. Every procedural rule governing the admission of such evidence was broken - a fact pointed out by the circuit court judge (R. 6) and readily admitted by defense counsel (R. 3-5).

The only reason for failing to file a proper and timely motion which counsel offered the court was that she "was not aware that (she) could have made it be-

cause Mr. Lucas had a different attorney. In fact, (she) was appointed to this case one week prior to trial initially when he had his first attorney." (R. 5).

The circuit court record contains an appearance filed by Respondent's retained on October 25, 1984 (J. A. 2). As late as November 14, 1984, his retained attorney filed a motion to adjourn the trial in order to conduct a polygraph examination (J. A. 2). An order bearing the signature of the retained attorney is contained in the court file.

The court file also notes an entry on a "Case Inquiry" form for January 31, 1985 (J. A. 2)] assigning the matter for trial and indicating the name of the Respondent's newly-appointed attorney, Gayle Fort Williams. An appearance filed by Ms. Williams on February 8, 1985 as well as an order granting an adjournment of the trial (for the reason that counsel had just been appointed) is also contained in the circuit court file (J. A. 2).

In order to have complied with the notice provisions of [MCL 750.520j(2); MSA 28.788(10)(2)] ("10 days after the arraignment on the information"), the notice would have to have been filed by November 4, 1984.

If the Respondent's original attorney was still the attorney-of-record on November 4, 1984, it would have been his responsibility to file the notice. The court records indicate that he was and, since he was the attorney who conducted an extensive cross-examination of the complainant as well as a thorough examination of his client at the September 18, 1984 preliminary examination at which the fact of their prior sexual relationship was made a matter of record it cannot be said that he was unaware of it or that it may have been relevant to the claim of consent. Nor can it be assumed that he was ignorant of the statutory requirements.

If Respondent's appointed counsel

had not entered the case until sometime after the November 4, 1984 cut-off date, no explanation was ever offered to excuse the failure to file a motion and seek an in camera hearing at any time prior to the trial date.

In view of the pre-trial posture of the case, there could be no claim that the evidence was "newly discovered" (the only exception set forth in the statute for the failure to file a timely notice).

In view of the blatant and wholly inexplicable failure to comply with the statute (or even to seek a delayed hearing on the matter), it cannot be said that the court's refusal to "allow evidence, testimony of their prior sexual intercourse" (R. 3-4) was an abuse of discretion.

Simply because the type of sexual conduct which the defendant and complainant had engaged in on previous occasions during their relationship was brought out at the preliminary examination, it cannot

be said that this fact alone dispensed with the notice requirement or any of the other procedural rules for admission of the evidence or that the prosecution thereby waived its right to enforce those rules at trial.

As noted by the trial prosecutor (an assistant prosecutor other than the one who conducted the preliminary examination), the rights "referred to in our Rape Shield Statute are rights that belong to the complaining witnesses in these criminal sexual conduct cases. They are not rights to be taken lightly and even waived by prosecutors in trials like this." (R. 5). As these rights are intended to be personal to the victim, the fact that the details of her prior sexual activities came to light during a pre-trial hearing simply does not imply that the defendant has secured a right to present such evidence at every subsequent hearing.

Nor can it be assumed that the de-

fense will attempt to admit such evidence at the trial itself. In preparing for trial, defense counsel will necessarily weigh the strengths and weaknesses of his or her case and that of the prosecution. As part of this process, a determination will be made regarding which pieces of evidence will be needed to present a viable defense to the charge. If it is necessary to elicit the details of specific acts of prior sexual intercourse [e.g., "patterns of behavior" [People v Perkins, 379 N.W.2d 390, 391 (Mich. 1986)], he may notify the court and move for its admission. If such evidence is deemed to be unnecessary, counsel may make a conscious decision to avoid it at trial - even though it may have been brought forth at a previous hearing. In short, unless the defense files a timely notice and moves for its admission as required by the rape shield law, the prosecution cannot be presumed to know that the defendant will attempt to uti-

lize the same evidence which may have been presented at an earlier hearing.

The right to confrontation does not entitle a defendant to expose a victim's sexual past at every turn in the criminal justice process without prior notice. This is especially true where it is not relevant to the defense asserted.

B. TESTING RELEVANCE.

The notice requirement is but the first hurdle which the accused must overcome in his quest to secure admission of evidence of his prior sexual relations with the complaining witness. An offer of proof must be made which establishes, to the satisfaction of the trial court, that the evidence specifically relates to a critical element of the defense raised. This is true even where the defense is consent and the evidence concerns prior sexual activity between the accused and the victim.

In the instant case, defense counsel

merely moved to admit "testimony concerning prior sexual intercourse between the defendant and the complainant." (R. 3). Counsel did not indicate whether she wanted to introduce the simple fact that a previous sexual relationship existed or whether she intended to elicit testimony regarding specific instances of sexual activity or the details of prior sexual encounters. She also made no attempt to explain how such evidence would be relevant to the Respondent's defense to the charges against him. In short, defense counsel failed to make a sufficient offer of proof. Aside from the failure to comply with the notice requirement, the lack of an adequate offer of proof is also a basis for preclusion.[12]

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12. E.g., People v McKenna, 585 P.2d 275, 279-280 (Colo. 1978) ("[Defendant] never indicated, by offer of proof or otherwise, what past sexual conduct by the victim he hoped to prove, or how her sexual history might be relevant to his defense."); Wright v State, 513 A.2d 1310, 1313 (Del.Supr. 1986) ("[E]ven assuming that compliance with the statu-

In the instant case, the court of appeals not only adopted an earlier decision which held that the notice provision was unconstitutional but also found that the in camera hearing procedure to test the relevance of the evidence was an unnecessary requirement. It did so by relying upon the following language found in People v Williams, 289 N.W.2d 863, 866-867 (Mich.App. 1980):

> "... (T)he very nature of the evidence sought to be presented, i.e., prior instances of sexual conduct between a complainant and a codefendant is personal between the parties. As such,

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12. (con't.) tory procedure could be excused in this case, the trial judge concluded that the defendant had not provided a sufficiently relevant factual basis to permit the victim's credibility to be attacked by introducing evidence of previous sexual conduct."); State v Hopkins, 377 N.W.2d 110, 117 (Neb. 1985) ("[I]n order that a victim's past consensual sexual behavior with a defendant be admitted as evidence relevant to a charge of sexual assault, the defendant must, by offer of proof at the in camera hearing, adduce some evidence tending to prove a defendant's claim that the victim consented to the sexual act which is the subject of the prosecuted charge against the defendant.")

> it does not involve a subject matter that requires further witnesses to develop. An in camera hearing will necessarily focus on a complainant's word against the word of a codefendant. Requiring notice in this situation, then, would serve no useful purpose. There would be no witnesses to investigate and, thus, no necessity for preparation time." [People v Lucas, 408 N.W.2d 431, 431 (Mich. App. 1987).

To be sure, credibility is the key factor for the jury or judge to determine in the trial of a criminal matter. However, for evidence to be admissible (and, therefore, be properly placed before the fact-finder), relevance must first be established. By relying upon the above-cited statement in Williams, the court completely ignored or overlooked the primary and indispensable purpose which is served by the in camera hearing procedure; namely, to determine whether even "arguably" relevant evidence may be excluded when it is shown to be more prejudicial than probative and legally irrelevant to the defense asserted.

Even if the Respondent had complied with this second procedural requirement by filing "a written motion and offer of proof" [pursuant to MCL 750.520j(2); MSA 28.788(10)(2)], he would have then have had to demonstrate legal relevance. As aptly noted by the court in State v Daniels, 512 A.2d 936, 938 (Conn.App. 1986):

> "If the proffered testimony is not relevant to a material issue in the case, the defendant's right to confront his accuser is not affected."

C. SHOWING PREJUDICE OR LACK OF "HARMLESS ERROR".

In lieu of granting the Petitioner's application for leave to appeal following the initial reversal of the Respondent's conviction, the Michigan Supreme Court remanded the case to the court of appeals for a determination of whether the preclusion of the evidence was nonetheless "harmless beyond a reasonable doubt" [433 Mich 876-877 (1989)].

The court of appeals again reversed.

It found that "(v)irtually all of the evidence in this case consisted of complainant's word against the word of defendant". As such, the court could not find that preclusion of "prior instances of sexual relations" was harmless beyond a reasonable doubt because "the question of credibility was central to this case." [Opinion of the Michigan Court of Appeals (On Remand), Petition for Certiorari, pp. 11a-12a].

Petitioner respectfully contends that the court of appeals did not look far enough.

While maintaining that the circuit court properly excluded the evidence on procedural grounds, Petitioner asserts that the Respondent was not denied his right to effective cross-examination so as to violate his right of confrontation. Respondent has not, and simply cannot, show that his defense was in any way prejudiced by the exclusion of the evidence.

In this respect, the Petitioner's

claim is more accurately one of "lack of prejudice" (there being no error in the exclusion of the evidence) rather than one of "harmless error".

In People v LaLone, 437 N.W.2d 611 (Mich. 1989), the court held that the exclusion of evidence of the victim's sexual history did not violate either the rape shield statute or the defendant's Sixth Amendment right to confrontation. Writing for a majority of the court on this issue, Justice Archer noted that evidence other than the complainant's sexual history was presented from which her bias could be inferred. As such, its exclusion was "not constitutional error violative of the defendant's Sixth Amendment rights." (437 N.W.2d at 621). After citing Delaware v Van Arsdall for the proposition that the right to confrontation ensures the "opportunity for effective cross-examination" (437 N.W.2d at 621), Justice Archer added:

> "Unlike the defendant in Davis [v. Alaska, 415 U.S. 308, 94

> S.Ct. 1105 (1974)], the trial court's exclusion of the complainant's sexual history left the defendant with several avenues to explore the complainant's bias or motive to fabricate." (437 N.W.2d at 621).

In State v Hamilton, 289 N.W.2d 470 (Minn. 1979), the defendant claimed that he was denied his right to confrontation by the trial court's refusal to permit him to question the complainant regarding her previous sexual conduct. The court rejected this contention by noting that defense counsel conducted an extensive cross-examination concerning the events charged in the complaint, that the defendant had ample opportunity to present his defense "and, through his witnesses, to raise the issue of the complainant's prior sexual conduct as it relate[d] to the issue of consent"; and, that the prosecution did not deny the complainant's prior sexual activity but only questioned its relevance. (289 N.W.2d at 476). See also State v Larson, 389 N.W.2d 872 (Minn. 1986). Faced with a

similar claim of constitutional error, the court in People v Smith, 340 N.W.2d 855 (Mich.App. 1983) noted as follows:

> "There is one final reason why the trial court's refusal to allow the proposed cross-examination could not have been reversible error; **defendant was not prejudiced by the refusal because evidence of his prior sexual activity with the complainant was in fact admitted later at trial. The court permitted defendant to testify during his own direct examination that he had had some sexual encounters with the complainant.**" 340 N.W.2d at 857 (emphasis added).

In the instant case, the Respondent was also afforded every opportunity to explore his past sexual relationship with the complainant. The record of the trial proceedings reveals quite unequivocally that evidence of this relationship was submitted to the fact-finder.

The Respondent waived his right to a jury trial, electing instead to be tried by the court (R. 6-8). Immediately prior to the jury waiver, defense counsel requested the court to grant an untimely

motion to allow testimony regarding the complainant's prior sexual relationship with the Respondent (R. 3-6). While the circuit judge denied the request, the motion in and of itself brought to the attention of the trier-of-fact the information that there had been a sexual relationship between the Respondent and the complainant.

The complainant, the Respondent, and the complainant's mother testified that there had been a "boyfriend-girlfriend" relationship (R. 10-13, 125, 164-166).

Through the Respondent's testimony, it was shown that the complainant was familial with the upstairs portion of his home, including the bedroom (R. 168-169). He testified that the complainant had told him at some point before the events of August 31, 1984 that she was pregnant with his child. He testified that the reason he hit her on the day in question was because she told him that the child was not his (R. 205-210). An even more

explicit indication to the trier-of-fact that a prior sexual relationship had existed came from the Respondent's statement that he believed that he had contracted gonorrhea from the complainant (R. 182, 190-191).

It is, therefore, apparent that in spite of the circuit court's denial of the Respondent's belated motion, it was well within the knowledge of the trier-of-fact that he and the complainant had been involved in a prior consensual sexual relationship. Armed with this knowledge, the circuit judge then weighed the credibility of the witnesses and found the Respondent guilty.

It cannot be said that the trier-of-fact was deprived of any relevant evidence due to the denial of the motion. Nor can it be said that the Respondent was in any way prevented from conducting an effective cross-examination. Indeed, the Respondent never indicated in what manner any of the specific details of his

prior sexual encounters with the complainant would have been relevant to his theory of the case.

If there was no prejudice to the Respondent, there was no error. If there was error, the facts of this case clearly indicate that it was harmless beyond a reasonable doubt.

RELIEF

WHEREFORE, Petitioner requests this Honorable Court to reverse the Michigan Court of Appeals.

Respectfully submitted,

JOHN D. O'HAIR
Prosecuting Attorney
County of Wayne

TIMOTHY A. BAUGHMAN
Chief of Research,
Training and Appeals

DON W. ATKINS
Principal Attorney, Appeals
12th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: (313) 224-5794

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TAB/DWA/mlw